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UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF CALIFORNIA

LOUISE CLARK, an individual and on)	CASE NO. 14-CV-1404 JLS WVG
behalf of all others similarly situated,)	
) PLAINTIFF'S MEMORANDUM OF
Plaintiff,)	POINTS AND AUTHORITIES IN
) OPPOSITION TO DEFENDANTS'
vs.)	MOTION TO DISMISS FIRST
) AMENDED COMPLAINT
CITIZENS OF HUMANITY, LLC, a)	
Delaware Limited Liability Company;)	Date: January 22, 2015
MACY'S, INC., a Delaware)	Time: 1:30pm
Corporation; and DOES 1 through 100,)	Ctrm: 4A
inclusive,)	Judge: Hon. Janis L. Sammartino
)
Defendants.)	
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Plaintiffs Louise Clark ("Plaintiff Clark") and Robyn Marnell ("Plaintiff Marnell" collectively, with Plaintiff Clark, "Plaintiffs") submit this Memorandum of Points and Authorities in Opposition to the Motion to Dismiss First Amended Complaint filed by Defendants Citizens of Humanity, LLC ("Citizens") and Macy's, Inc. ("Macy's") on December 9, 2014.

I. INTRODUCTION.

Citizens and Macy's (collectively "Defendants") Motion to Dismiss First Amended Complaint (the "Motion") asks this Court to boldly go where no other court in California has ever gone in the 54 years¹ since the California "Made in USA" statute was enacted. Specifically, Defendants ask this Court to find that the California "Made in USA" statute is preempted by federal law and violates the Dormant Commerce Clause.²

As an initial matter, not only did California enact a statute to protect the "Made in USA" label in California in the form of Business & Professions Code § 17533.7,³ but the California Supreme Court recently confirmed the importance of the California "Made in USA" standard in one of its most important consumer protection decisions in recent years by stating that:

¹ Business & Professions Code § 17553.7 was enacted in 1961.

² Defendants filed a request for judicial notice along with the filing of this Motion. The FTC documents cited therein may be judicially noticed for their existence but not for the truth of the matter asserted therein. *See Rowland v. Paris Las Vegas*, No. 3:13-cv-02630-GPC-DHB, 2014 U.S. Dist. LEXIS 108565, at *11 (S.D. Cal. Aug. 6, 2014) (taking judicial notice of certain documents but not for the truth of the matters asserted therein); *In re Bare Escentuals, Inc. Sec. Litig.*, 745 F.Supp.2d 1052, 1067 (N.D. Cal. 2010) ["the court may take judicial notice of the existence of unrelated court documents, although it will not take judicial notice of such documents for the truth of the matter asserted therein."].

³ Business & Professions Code § 17553.7 makes it unlawful to label any merchandise with the statement "Made in the U.S.A" "when the merchandise or any article, unit, or part thereof, has been entirely or substantially made, manufactured, or produced outside of the United States."

1 **Simply stated: labels matter.** The marketing industry is based
 2 on the premise that labels matter, that consumers will choose one
 3 product over another similar product based on its label and
 4 various tangible and intangible qualities they may come to
 5 associate with a particular source. . . . In particular, to some
 6 consumers, the “Made in U.S.A.” label matters. A range of
 7 motivations may fuel this preference, from the desire to support
 8 domestic jobs, to beliefs about quality, to concerns about
 9 overseas environmental or labor conditions, to simple patriotism.
 10 The Legislature has recognized the materiality of this
 11 representation by specifically outlawing deceptive and
 12 fraudulent “Made in America” representations. (§17533.7; see
 13 also Civ.Code, §1770, subd. (a)(4) [prohibiting deceptive
 14 representations of geographic origin].) The object of section
 15 17533.7 “is to protect consumers from being misled when they
 16 purchase products in the belief that they are advancing the
 17 interests of the United States and its industries and workers....”

18 *Kwikset Corp. v. Superior Court*, 51 Cal.4th 310, 328 (2011).

19 In this case, Defendants manufactured and sold jeans in California that were
 20 labeled as “Made in the U.S.A.” FAC ¶¶ 1, 3, 18, 20, 23-26, 29, 31.⁴ Plaintiffs
 21 bring this class action on behalf of all purchasers of “Made in the U.S.A.” or
 22 “Made in the USA” labeled apparel products manufactured, distributed, marketed,
 23 and/or sold by defendant Citizens of Humanity, LLC in California. Plaintiffs also
 24 assert a subclass of consumers who purchased any of Citizens’ jean products
 25 online (the “Online Purchaser Subclass”) as well as a subclass that extends to
 26 consumers who purchased any of Citizens’ jean products that were labeled as
 27 “Made in USA with imported fabric” (the “Imported Fabric Subclass”). FAC ¶¶
 28 32-33.⁵ Regardless of which country of origin label was set forth on the jeans, the

⁴ “FAC” refers to the First Amended Complaint filed on November 20, 2014.

⁵ Defendants’ incorrectly state that the jeans purchased by Plaintiffs were labeled “MADE IN U.S.A. OF IMPORTED FABRIC.” Mot. at 3 n.2. While this action includes an Imported Fabric Subclass, which did in fact see such a label, Plaintiffs’ jeans bore the label “Made in the U.S.A.” FAC ¶¶ 23-24, 31-33.

1 jeans contained multiple component parts manufactured outside of the United
2 States in violation of California law. FAC ¶ 3, 4, 19, 23, 24, 48, 54, 55, 68.
3 Plaintiffs each purchased a pair of these jeans and discovered (after their purchase)
4 that the jeans were comprised of foreign manufactured component parts, which
5 rendered the “Made in the USA” representation false under California law.
6

7 Defendants now move to dismiss the First Amended Complaint based on
8 federal preemption and the Dormant Commerce Clause. Defendants’ Motion is
9 largely premised on the fact that there are federal statutes and regulations
10 governing the “Made in U.S.A.” label and that these laws allegedly preempt
11 California’s “Made in USA” statute because of the differences between the two
12 standards. Defendants also allege that California’s statute violates the Dormant
13 Commerce because it imposes stricter labeling requirements than the federal
14 statutes and would create a significant burden on interstate commerce. The
15 Motion, however, suffers from fundamental flaws in its arguments.

16 First, this Court (by way of the Hon. Dana Sabraw) recently held that the
17 California’s “Made in U.S.A.” statute is not preempted by federal law. *Paz v. AG*
18 *Adriano Goldschmeid, Inc.*, No. 14cv1372 DMS (DHB), 2014 U.S. Dist. LEXIS
19 156413 (S.D. Cal. Oct. 27, 2014); *Id.* at *7-8 [The Court agrees that with these
20 types of products California law prohibits the use of a “Made in U.S.A.” label
21 whereas federal law does not. However, the Court disagrees that this results in
22 conflict preemption.”]. Nearly identical to the facts in this case, the plaintiff in *Paz*
23 alleged that the “Made in U.S.A.” label on defendants’ jeans violated California
24 state law and the defendants moved to dismiss the complaint on federal preemption
25 grounds. *Id.* at *2-3. The Court in *Paz* held that the plaintiff’s state claims were not
26 preempted by federal law. *Id.* at *16. This is enough, standing alone, to end the
27 preemption inquiry.

28 Second, the principle federal law cited by Defendants (15 USC § 45a or

1 "Section 45a") explicitly states that "[n]othing in this section shall preclude the
2 application of other provisions of law relating to labeling." This language
3 establishes that Congress did not intend to "occupy the field" in this area of the law
4 (this language should also serve to end the preemption inquiry). *See Wyeth v.*
5 *Levine*, 555 U.S. 555 (2008) (finding that Congressional intent was the key to the
6 preemption analysis). The Court, in *Paz*, already found that "there is nothing in
7 [15 U.S.C. § 45a] that indicates Congress intended to preempt the field of 'Made in
8 U.S.A.' labels." *Paz*, 2014 U.S. Dist. LEXIS 156413, at *12.

9 Third, as this Court is well aware, there is no absolute prohibition against the
10 federal government and state governments legislating the same conduct. State law
11 will only be preempted under *limited* circumstances. One of these instances occurs
12 when federal and state laws conflict to the extent that full compliance with both
13 laws is "impossible" or where the state law is an obstacle to the federal law. As
14 the Court in *Paz* already recognized, however, "it would not be impossible for
15 Defendants to comply with both ['Made in U.S.A.'] laws" nor would "compliance
16 with one [] be an obstacle to the other." *Paz*, 2014 U.S. Dist. LEXIS 156413, at
17 *8-9 & nn.1-3. The fact that California opted to enact a stricter standard does not
18 mean the state statute will necessarily conflict with the federal statute. In fact,
19 common sense dictates that Defendants could have easily complied with both
20 federal and California labeling laws by either manufacturing the jeans in the
21 United States with 100% U.S.-made component parts or simply labeling the jeans
22 with a *truthful* qualified statement such as "Made in the U.S.A. with foreign made
23 fabric, buttons, zippers, and thread."

24 Fourth, the federal laws championed by Defendants have no private right of
25 action. Undoubtedly Defendants and other apparel manufacturers would rejoice if
26 this Court granted the Motion because without a private right of action, there
27 would be little that California consumers could do to enforce any "Made in USA"
28

1 standard against unscrupulous manufacturers. Defendants are willing to accept
2 money from California consumers but apparently unwilling to comply with
3 California's labeling laws while doing so.

4 Lastly, California Courts have recognized that California has a substantial,
5 legitimate interest in protecting its citizens from receiving deceptive unsolicited
6 materials and that state statutes eliminating fraud and deception actually facilitate
7 interstate commerce rather than impede it. *See Ferguson v. Friendfinders, Inc.*, 94
8 Cal.App.4th 1255 (2002). Although California enacted a stricter statute than
9 federal law, compliance with the California statute does not violate or preclude the
10 Defendants' from selling its products in other states, nor does it conflict with the
11 enforcement of other state laws. In fact, the stricter California provision promotes
12 other state laws by ensuring that truthful disclosures are made to consumers. Thus,
13 as fully detailed herein, there is no federal preemption or violation of the Dormant
14 Commerce Clause and this Court is wholly proper in denying the Motion.

15 **II. STATEMENT OF FACTS.**

16 Citizens designs and markets denim jeans in the United States. FAC ¶ 8.
17 One of its lines of jeans is the "BOYFRIEND" brand. *Id.* Its products are distributed
18 in 35 countries through 1,300 retailers, including Macy's. *Id.*

19 Plaintiff Clark entered a Macy's store in San Diego County on May 31, 2014
20 and purchased a pair of Citizen's BOYFRIEND brand jeans. FAC ¶ 23. Plaintiff
21 Marnell went online at Shopbop.com in April 2014 and purchased a pair of
22 Citizens' BOYFRIEND brand jeans. FAC ¶ 24. At the time of each Plaintiff's
23 purchase, the jeans were prominently labeled as "Made in the U.S.A." FAC ¶¶ 23-
24 24. In truth, Citizens' jeans "are substantially and/or partially made, manufactured,
25 or produced with component parts that are manufactured *outside of the United*
26 *States.*" FAC ¶ 19 [Emphasis in original]. These jeans consist of fabric, thread,
27 buttons, and/or rivets which are manufactured outside the United States. *Id.*
28

1 Citizens also uses foreign manufactured components in other models of jeans. *Id.*

2 This lawsuit was filed by Plaintiff Clark on June 9, 2014. Docket No. 1. On
 3 November 20, 2014, a First Amended Complaint was filed adding Plaintiff
 4 Marnell. Docket No. 18. The First Amended Complaint alleges Defendants'
 5 actions of manufacturing and selling the jeans with an unqualified "Made in the
 6 USA" label is a violation of Business and Professions Code section 17533.7. FAC
 7 ¶ 68. The false label also violates Civil Code section 1750 *et seq.* and Business
 8 and Professions Code section 17200 *et seq.* FAC ¶¶ 47-51 and 54-58. Plaintiffs
 9 bring this lawsuit on behalf of themselves and all other similarly situated who
 10 purchased Citizens' falsely labeled jeans in California. FAC ¶ 30-41.

11 Defendants elected to file this Motion predicated primarily on federal
 12 preemption. Specifically, Defendants argue that the California "Made in USA"
 13 statute is preempted by two federal statutory schemes: (a) the Federal Trade
 14 Commission Act ("FTC") (15 U.S.C. section 45a) and its regulations; and (b) the
 15 Textile Fiber Products Identification Act (15 U.S.C. section 70) and its regulations.
 16 Defendants further argue that the California statute is unconstitutional under the
 17 Dormant Commerce Clause. Plaintiffs now oppose the Motion.

18 **III. THE LEGAL STANDARDS.**

19 **A. The Motion to Dismiss under Federal Rule of Civil Procedure** 20 **12(b)(6).**

21 "To survive a motion to dismiss, a complaint must contain sufficient factual
 22 matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) citing *Bell Atlantic Corp. v. Twombly*,
 23 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff
 24 pleads factual content that allows the court to draw the reasonable inference that
 25 the defendant is liable for the misconduct alleged." *Ashcroft*, at 678. "Well-
 26 pleaded factual allegations are taken as true, but conclusory statements or 'bare
 27
 28

1 assertions' are discounted." *Recinto v. United States Dep't of Veterans Affairs*, 706
 2 F.3d 1171, 1177 (9th Cir. 2013.)

3 **B. Federal Preemption.**

4 "Federal law may preempt state law in three ways: (1) express preemption;
 5 (2) field preemption; and (3) conflict preemption." *Gadda v. Ashcroft*, 377 F.3d
 6 934, 944 (9th Cir. 2004). Defendants' motion is limited to conflict preemption.
 7 Mot. at 6. Plaintiffs will limit their analysis accordingly.

8 California is well within its police powers to enact legislation to protect its
 9 citizens from deceptive advertising. *Farm Raised Salmon Cases*, 42 Cal.4th 1077,
 10 1088 (2008). In fact, one notable California case states that California has "a
 11 fervent interest" in protecting its citizens from deceptive advertising. *Keimer v.*
 12 *Buena Vista Books*, 75 Cal.App.4th 1220, 1230 (1999). "In preemption analysis,
 13 courts should assume that 'the historic police powers of the States' are not
 14 superseded 'unless that was the clear and manifest purpose of Congress.'" *Arizona*
 15 *v. US*, 132 S.Ct. 2492, 2501 (2012). Therefore, "[p]reemption law begins with the
 16 presumption that Congress does not 'intend to displace state law.'" *Holmes v.*
 17 *Merck & Co.*, 697 F.3d 1080, 1085 (9th Cir. 2012). Defendants bear the burden of
 18 establishing preemption. *Jimeno v. Mobil Oil Corp.*, 66 F.3d 1514, 1526 n. 6 (9th
 19 Cir. 1995); *Motus v. Pfizer Inc.*, 127 F.Supp.2d 1085, 1092 (C.D. Cal. 2000).

20 "Conflict preemption ... has two forms: impossibility and obstacle
 21 preemption." *United States v. Arizona*, 641 F.3d 339, 345 (9th Cir. 2011) affirmed
 22 in part, reversed in part on other grounds 132 S.Ct. 2492 (2012); *Gilstrap v. United*
 23 *Air Lines, Inc.*, 709 F.3d 995, 1008 (9th Cir. 2013). Plaintiffs will separately
 24 address these two forms of conflict preemption.

25 **IV. THERE IS NO CONFLICT PREEMPTION BECAUSE DEFENDANT**
 26 **MAY COMPLY WITH BOTH THE CALIFORNIA STATUTE AND**
 27 **THE FEDERAL STATUTES.**

28 The presence of "conflict preemption will be found when simultaneous

compliance with both state and federal directives is **impossible.**” *Viva!*
International Voice for Animals v. Adidas Promotional Retail Operations, Inc., 41
 Cal.4th 929, 936 (2007). “The existence of a hypothetical or potential conflict is
 insufficient to warrant the pre-emption of the state statute.” *Rice v. Norman*
Williams Co., 458 U.S. 654, 659 (1982). Further, “courts are not to seek out
 conflicts between state and federal regulation where none clearly exist.” *Pacific*
Legal Foundation v. State Energy Res. Conservation & Dev. Com., 659 F.2d 903,
 919 (9th Cir. 1981).

**A. California’s “Made in USA” Statute Is Not Preempted by the FTC’s
 “Made in USA” Standard.**

California’s statute precludes the use of a “Made in USA” label if the
 product contains “any article, unit, or *part thereof*, has been entirely or
 substantially made ... outside of the United States.” *Colgan v. Leatherman Tool*
Group, Inc., 135 Cal.App.4th 663, 684 (2006) [*Italics in original*]. This means
 “when merchandise consists of two or more physical elements or pieces, section
 17533.7 also applies to any distinct component of merchandise that is necessary for
 its proper use or operation.” *Benson v. Kwikset Corp.*, 152 Cal.App.4th 1254, 1273
 (2007). This statute is different than the federal “Made in USA” standard.

The federal “Made in USA” standard requires that “[a] product that is all or
 virtually all made in the United States will ordinarily be one in which all
 significant parts and processing that go into the product are of U.S. origin.”
Colgan, at 688 citing Fed. Trade Com., *Enforcement Policy Statement on United*
States Origin Claims, 62 Fed. Reg. 63756, 63768 (Dec. 2, 1997) fn. omitted. ““In
 other words, where a product is labeled or otherwise advertised with an unqualified
 ‘Made in USA’ claim, it should contain only a *de minimis*, or negligible, amount of
 foreign content.”” *Id.* The federal standard employs a case-by-case review and
 looks at a “number of factors” to determine whether the product is “Made in

1 USA.” *Id.* at 688-689 citing FTC Enforcement Policy Statement at 63768-63769.
 2 These factors include (1) “the location of a product’s final assembly,” (2) whether
 3 the product was “substantially transformed” in the United States and (3) “the
 4 percentage of the total cost of manufacturing the product that is attributable to U.S.
 5 costs ... and to foreign costs.” *Id.*

6 There is no dispute California’s “Made in USA” statute and the federal
 7 “Made in USA” statute are different in their treatment of component parts within a
 8 product. Defendants, however, ignore the fundamental principal that “the mere
 9 existence of a different state standard does not inevitably lead to a conflict with
 10 federal law; rather, the challenged state law must in some manner impair the
 11 attainment of federal objectives.” *People v. Conklin*, 12 Cal.3d 259, 270-71
 12 (1974). “A State may voluntarily impose substantive requirements that are more
 13 restrictive than what federal law would require, but not less restrictive.” *Northwest*
 14 *Environmental Defense Center v. Owens Corning Corp.*, 434 F.Supp.2d 957, 973-
 15 74 (D. Or. 2006); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132,
 16 145 (1963). “Federal law sets a floor, i.e., the minimum requirements that must be
 17 met.” *Northwest Environmental*, at 973.

18 This is precisely the situation with the California’s “Made in USA” statute at
 19 issue in this case.⁶ In fact, this Court recently found that “[a]lthough the laws set
 20 out different standards for the use of ‘Made in U.S.A.’ labels, it would not be
 21 impossible for Defendants to comply with both laws.” *Paz*, 2014 U.S. Dist. LEXIS
 22 156413, at *8; *see also Greater Los Angeles Agency on Deafness, Inc. v. Cable*
 23 *News Network, Inc.*, 742 F.3d 414, 429-30 (9th Cir. 2014) (quoting *Nat’l Ass’n of*
 24 *the Deaf v. Netflix, Inc.*, 869 F.Supp.2d 196, 205 (D. Mass. 2012) (internal
 25 quotations omitted) [“To the extent that the federal captioning scheme and the
 26

27 ⁶ California has historically been a leader in promulgating environmental
 28 standards, labor standards, and other key standards that are higher than or more
 restrictive than similar federal standards in an interest to protect its citizenry.

1 DPA may require different captioning requirements or deadlines, these differences
2 do not ‘create a positive repugnancy between the two laws’ or otherwise
3 demonstrate an irreconcilable conflict between federal law and the DPA because
4 CNN can comply with both.”].

5 The federal statute permits manufacturers to label their products as “Made in
6 USA” even if they use small amounts of foreign-made component while California
7 law permits products to be labeled as “Made in USA” only if all of the components
8 are made in the United States. There simply is no “impossibility” argument
9 available to Defendants because a product that is entirely made of U.S.-made
10 component parts can properly labeled as “Made in USA” under both the federal
11 standard and the California statute. Since Defendants make no showing that
12 complying with both the federal and California statute is “impossible,” the Motion
13 should be denied on that basis alone.

14 **B. California Law is Consistent with the Federal Regulations**
15 **Promulgated Under the Textile Fiber Products Identifications**
16 **Act.**

17 Defendants also argue there is a conflict between the California “Made in
18 USA” law and the Textile Fiber Products Identifications Act (“TFPIA”).
19 According to Defendants, “federal rules mandate inclusion of ‘Made in the U.S.A.’
20 or similar phrasing on labeling, even if the garments include components obtained
21 from outside the United States.” Motion at 15 [Emphasis omitted]. This Court
22 rejected an identical argument in *Paz*, finding that the TFPIA does *not* require
23 Defendants to use a “Made in U.S.A.” label even if the garment includes foreign-
24 made materials and concluding that “the TFPIA does not require labeling that is
25 prohibited by California law.” 2014 U.S. Dist. LEXIS 156413, at *13. In point of
26 fact, the federal regulations and California law are actually substantively similar in
27 their treatment of the subject.

28 The Code of Federal Regulations (“CFR”) promulgated under the TFPIA

1 states that “[e]ach textile fiber product completely made in the United States of
 2 materials that were made in the United States shall be labeled using the term *Made*
 3 *in U.S.A.* or some other clear and equivalent term.” 16 C.F.R. § 303.33, subd.
 4 (a)(2) [*Italics in original*]. This is consistent with California law as both the
 5 product and *its component parts* must be made in the United States. It is worth
 6 noting that Defendants elected to ignore this requirement in their Motion.

7 Instead, their Motion focuses on the next subsection in the CFR that states if
 8 the “textile fiber product [is] made in the United States either in whole or in part of
 9 imported material, shall contain a label disclosing these facts.” 16 C.F.R. §303.33,
 10 subd. (a)(3). This subdivision states:

11 (3) Each textile fiber product made in the United States, either in whole or
 12 in part of imported materials, shall contain a label disclosing these facts;
 13 for example:

14 Made in USA of imported fabric

15 or

16 Knitted in USA of imported yarn

17 *Id.*

18 The CFR’s use of the phrase “for example” is telling. The CFR does not
 19 mandate the use of the “Made in USA of imported fabric” label with wording such
 20 as “shall” or “must.” This is of critical importance to the analysis because the
 21 word “example” is defined by Webster’s Dictionary as “something or someone
 22 chosen from a group in order to show what the whole group is like.” Accordingly,
 23 a wide range of labeling options were available to Citizens that would have made
 24 the labeling on the jeans both truthful and compliant with California law such as
 25 “Made in the U.S.A. with foreign made fabric, buttons, zippers, and thread,”
 26 “Made in USA of globally sourced component parts,” “Sewn in USA from Italian
 27 Fabric and Chinese made accessories,” etc. To further emphasize this point, the
 28

1 CFR (in a section of the CFR that was ignored by Defendants) lists various “examples” of labeling options that a manufacturer (such as Citizens) could have used on the jeans when utilizing both foreign and domestic manufacturing process:

(i) The manufacturing process in the foreign country and in the USA; for example:

“Imported cloth, finished in USA”

or...

“Made in [foreign country], finished in USA”

or...

“Made in [Foreign Country]/fabric made in USA”

or

“Knit in USA, assembled in [Foreign Country]”.

16 C.F.R. §303.33, subd. (a)(4)(i).

Given the plethora of *truthful* labeling options available to Citizens (all of which would comply with California’s “Made in USA” statute), it is difficult to see how its use of the false “Made in USA of imported fabric” label inherently creates a conflict between federal and state law. As this Court recognized in *Paz*, Defendants “can simply indicate on the label that their products were ‘Made in U.S.A. of imported fabric and components,’ or something similar that accurately describes where the parts of the product and the product as a whole were sourced and made.” 2014 U.S. Dist. LEXIS 156413, at *13-14. Again, the “Made in USA of imported fabric” labeling issue is limited to the subclass, which is not the gravamen of Plaintiffs’ false labeling contentions against Defendants.

Moreover, it is important to note that to the extent Citizens labeled their jeans as “Made in the USA with imported fabric,” the California “Made in USA” statute would not apply to such representations. The California “Made in USA” statute applies only to unqualified “Made in USA” labels. Plaintiffs’ legal theory

1 supporting the subclass is a more general violation of California's Unfair
 2 Competition Law ("UCL") based on a material omission/half-truth. This material
 3 omission/half-truth is that many additional components of the jeans (in addition to
 4 the fabric) are foreign-made.⁷ Such representations, if false, are actionable
 5 pursuant to the California UCL and/or California's False Advertising laws (i.e.,
 6 Cal. Business & Professions Code §§ 17500 *et seq.*).

7 In either event, California law is not preempted because it is not
 8 "impossible" to comply with both the California law and the TFPIA based on the
 9 plethora of alternative and *truthful* labeling options available to Citizens. *See Paz*,
 10 2014 U.S. Dist. LEXIS 156413, at *13-16.

11 **V. THERE IS NO EVIDENCE SHOWING CALIFORNIA'S "MADE IN**
 12 **USA" STATUTE IS INCONSISTENT WITH CONGRESSIONAL**
 13 **OBJECTIVES.**

14 Defendants correctly note that federal preemption can occur when the state
 15 law "stands as an obstacle to the accomplishment and execution of the full
 16 purposes and objectives of Congress." *Crosby v. National Foreign Trade Council*,
 17 530 U.S. 363, 373 (2000). "[O]bstruction preemption focuses on both the
 18 objective of the federal law and the method chosen by Congress to effectuate that
 19 objective, taking into account the law's text, application, history, and
 20 interpretation." *McDaniel v. Wells Fargo Investments, LLC*, 717 F.3d 668, 674
 21 (9th Cir. 2013) citing *Ting v. AT&T*, 319 F.3d 1126, 1137 (9th Cir. 2003).

22 The federal "Made in USA" standard states "[n]othing in this section shall
 23 preclude the application of other provisions of law relating to labeling." 15 USC
 24 § 45a. "The statutory 'related to' text is 'deliberately expansive' and

25 ⁷ For example, a label stating "Made in USA of high quality Italian
 26 component parts" would certainly be actionable under California law if the "high
 27 quality" component parts were actually made in China. The California "Made in
 28 USA" statute would not apply to such representations, but California's UCL would
 apply pursuant to the "unfair" prong of the UCL. The UCL prohibits not only
 unlawful conduct, but "unfair" conduct that violates the "policy or spirit" of the
 law (the underlying law being the California "Made in USA" statute).

1 ‘conspicuous for its breadth.’” *Dilts v. Penske Logistics, Inc.*, 2014 U.S. App.
2 LEXIS 12933, *12 (9th Cir. July 9, 2014) citing *Morales v. Trans World Airlines,*
3 *Inc.*, 504 U.S. 374, 383–84 (1992) (internal quotation marks omitted). Based on
4 the language within 15 USC § 45a, it is evident that Congress intended to allow
5 other laws to complement the federal “Made in USA” standard. *See Paz*, 2014
6 U.S. Dist. LEXIS 156413, at *12 [“there is nothing in this portion of the statute
7 [15 U.S.C. § 45a] that indicates Congress intended to preempt the field of ‘Made
8 in U.S.A.’ labels.”]. The same is true of the TFPIA. Section 70k of the TFPIA (15
9 U.S.C. § 70k) states that “[t]he provisions of this subchapter shall be held to be in
10 addition to, and not in substitution for or limitation of, the provisions of any other
11 Act of the United States.” *Id.* Again, Congress explicitly acted to permit other
12 laws to supplement the TFPIA. *Paz*, 2014 U.S. Dist. LEXIS 156413, at *16
13 (“Defendants have failed to show Plaintiff’s [‘Made in U.S.A.’] claims are
14 preempted by the TFPIA.”)

15 Defendants cite two objectives underlying the federal law, the first being to
16 “prevent [] consumer deception.” Mot. at 12. Plaintiffs agree with Defendants
17 that the goal of the federal law is to prevent consumer deception, a purpose that is
18 shared by California state law. California recognizes “the policies underlying the
19 federal and California [‘Made in USA’] laws are the same.” *Colgan, supra*, 135
20 Cal.App.4th at 689; *Paz*, 2014 U.S. Dist. LEXIS 156413, at *9 n.2. “The object is
21 to protect consumers from being misled when they purchase products in the belief
22 that they are advancing the interests of the United States and its industries and
23 workers.” *Colgan*, 135 Cal.App.4th at 689. As explained by *Paz*:

24
25 Accurate labeling of this [“Made in U.S.A.”] information, in
26 turn, allows consumers to make informed decisions about
27 whether their purchases “support fellow Americans” or “harm
28 the American manufacturing base[.]” 62 Fed. Reg. at 63758-59.
These corresponding benefits are echoed in the California law.

1 *See Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 329 (2011)
2 (quoting *Colgan*, 135 Cal. App. 4th at 689) (stating purpose of
3 California law “‘is to protect consumers from being misled when
4 they purchase products in the belief that they are advancing the
5 interests of the United States and its industries and workers.’”).

6 *Id.*

7 Defendants mistakenly conclude that there is a second purpose of the federal
8 law, “encouraging businesses to manufacture in the United States by allowing
9 them to use the powerful ‘Made in the U.S.A.’ label.” Mot. at 12. Although
10 manufacturers can benefit from using a “Made in U.S.A.” label and this may be a
11 policy consideration to recognize, there is no indication that a manufacturer’s
12 benefit is an *objective* underlying the federal law. Defendants offer little to support
13 their position. Defendants quote the following from 62 FR 25020-01:

14 As the perception grows that America is losing jobs due to a
15 shrinking manufacturing base, and the availability of truly U.S.A
16 products declines, the fact that a product is Made in the USA.
17 becomes increasingly valuable to consumers who wish to buy
18 American.

19 Mot. at 9. Not only does this language alone demonstrate the legislative intent to
20 provide truthful labeling to consumers, but Defendants fail to include the next
21 sentence, which states, “In such a climate, we believe it becomes more, not less,
22 important to ensure that manufacturers are not using deceptive claims.” 62 FR
23 25020-01 at 25023 (emphasis added). Thus, it is clear that the purpose is to protect
24 consumers against deceptive advertisements and not to benefit manufacturers. The
25 only remotely relevant support provided by Defendants comes from 62 FR 63756-
26 01 at 63766, which states that the comparative “Made in U.S.A” claims are useful
27 for manufacturers to provide a distinction between the domestic content of their
28 products and those who engage in less domestic manufacturing. Again,
29 Defendants ignore the context in which this statement was made. The preceding
30 sentences within the same paragraph as the quoted language discuss how qualified

1 U.S. origin claims can provide valuable information to consumers, and that “all
2 such claims must be truthful and substantiated.” *Id.* Although a “Made in U.S.A.”
3 label may be beneficial to manufacturers, the intended purpose of the federal
4 statute is not to advance the interests of manufacturers. It is to inform consumers.

5 With a clear purpose underlying the federal law, it is glaringly apparent that
6 the California state law in no way impedes any federal objective. “If the purpose of
7 the false advertising law is to protect consumers from fraud and deceit, it is difficult
8 to see how that purpose is not served or is affirmatively violated, by a label that
9 accurately describes where a product and all its component parts are sourced and
10 manufactured. Defendants’ argument to the contrary, that section 17533.7 prohibits
11 such labels, even when they are accurate and not misleading, strains the purpose of
12 the statute, the FAL in general and common sense.” *Paz*, *16.

13 Defendants postulate a seriously flawed argument that the enforcement of
14 the state law will deprive Defendants of a right that the federal laws provide, the
15 right to use the “Made in U.S.A.” label. As discussed above, a more restrictive
16 state requirement does not equate to a conflict with federal law, or the taking away
17 of a right, unless it impairs a federal objective. *Conklin*, 12 Cal. 3d at 270-71;
18 *Northwest Environmental Defense Center*, 434 F.Supp.2d at 973-74. In *Conklin*,
19 defendants argued that a state statute was preempted by federal law since it forbade
20 wiretapping unless *all* parties to the communication consented, whereas the federal
21 law only required the consent of *one* party. 12 Cal. 3d at 270. Since the objective
22 of the federal law was to protect privacy, the state law did not impede this
23 objective but rather fulfilled and furthered the objective. *Id.* at 271-72. Similarly,
24 the more restrictive state law here furthers the federal objective (not impair it).

25 Further, the cases cited by Defendants in support of its argument are
26 inapposite. *See Paz*, 2014 U.S. Dist. LEXIS 156413, at *9 n.2 [“Given that the
27 purposes of the [state and federal] statutes are the same, it is not apparent on the
28

1 present facts how compliance with one would be an obstacle to the other.”]

2 In *Teltech Sys., Inc. v. Bryant*, 702 F.3d 232 (5th Cir. 2012), the federal law
3 explicitly outlawed the stricter state law requirement, therefore the state law was
4 preempted. This is not the case here. Specifically, in *Teltech Sys., Inc.*, the state
5 law at issue prohibited phone spoofing with the intent to “deceive, defraud or
6 mislead” the recipient of the call (“non-harmful spoofing”), whereas the federal
7 law prohibited spoofing with the intent to “defraud, cause harm, or wrongfully
8 obtain anything of value” (“harmful spoofing”). *Id.* at 234. After reviewing the
9 Congressional minutes, it became apparent that Congress intended only to prohibit
10 harmful spoofing and actually intended to protect non-harmful spoofing. *Id.* at 238.
11 In passing the federal bill, house members explicitly stated “We drafted . . .
12 carefully to ensure that we only prohibit [spoofing] intending to do harm. . . .
13 [T]his bill protects those legitimate [spoofing] practices.” *Id.* Thus, because the
14 clear intent of the federal bill was to prohibit harmful spoofing while protecting
15 non-harmful spoofing, the state law was contrary to federal objectives.

16 *Franklin Nat. Bank of Franklin Square v. New York*, 347 U.S. 373 (1954)
17 presented the narrow question of whether federal statutes authorizing national
18 banks to receive savings deposits conflicted with New York state law that
19 prohibited national banks from using the word “saving” or “savings” in their
20 advertising or business. The state statute only permitted New York state mutual
21 savings banks to use that language. *Id.* at 374. The Court held that the two statutes
22 were incompatible, explaining “We cannot believe that the incidental powers
23 granted to national banks should be construed so narrowly as to preclude the use of
24 advertising in any branch of their authorized business. It would require some
25 affirmative indication to justify an interpretation that would permit a national bank
26 to engage in a business but gave no right to let the public know about it.” *Id.* at
27 377-78. Thus, by prohibiting *any* use of the word savings, the New York law
28

1 clearly discriminated against national banks in favor of state mutual savings banks.

2 In *Fid. Fed. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982),
3 the preamble accompanying the final publication of the relevant federal regulation
4 explained the board's intent to displace state law, stating that the due-on-sale
5 practices of federal savings and loans were to be governed "exclusively by Federal
6 Law" and that "[federal] associations shall not be bound by or subject to any
7 conflicting State law which imposes different . . . due-on-sale requirements." *Id.* at
8 147. Thus, since the state law prohibited the enforcement of a due-on-sale clause
9 that the federal law permitted, the Court concluded that an actual conflict existed
10 and the federal law pre-empted the conflicting state limitations. *Id.* at 159.

11 Lastly, in *McDaniel v. Wells Fargo Investments, LLC*, 717 F.3d 668 (9th
12 Cir. 2013), plaintiffs' employers only allowed them to open self-directed trading
13 accounts in house, which amounted to self-patronage in violation of state law. The
14 court ruled that the state law was preempted by the federal law because the purpose
15 of the federal rule was to afford employers discretion over how to supervise their
16 employees according to what was reasonable in light of each broker's or dealers
17 business. *Id.* at 676. The employer's ability to have discretion over the policies
18 implemented was "critical to effectively preventing the misuse of material,
19 nonpublic information." *Id.* Thus, the state law that restricted the employer's
20 discretion impeded the federal objective and was preempted. *Id.*

21 Contrary to these cases, the purpose of both the federal and state laws is in
22 no way impeded by a stricter state requirement that mandates a more truthful
23 labeling requirement. Therefore, state law is hardly an obstacle and with no
24 contrary argument(s) in the Motion, Defendants utterly fail to demonstrate any
25 preemption that would warrant the granting of the Motion.

26 **VI. CALIFORNIA'S "MADE IN USA" STATUTE DOES NOT VIOLATE**
27 **THE DORMANT COMMERCE CLAUSE.**

28 Defendants' next argument is that California's "Made in USA" statute is

1 unconstitutional because it violates the Dormant Commerce Clause. The starting
2 point of such an argument is "a statute, once duly enacted, 'is presumed to be
3 constitutional.'" *Copley Press, Inc. v. Superior Court*, 39 Cal.4th 1272, 1302
4 (2006) [citing *Lockyer v. City of San Francisco*, 33 Cal.4th 1055, 1086 (2004)].
5 "Unconstitutionality must be clearly, positively, and certainly shown by the party
6 attacking the statute, and [the courts] resolve doubts in favor of the statute's
7 validity." *Id.* (emphasis added). Defendants again fall short of their burden.

8
9 Courts employ a two-tiered approach to analyze a statute under the Dormant
10 Commerce Clause. "When a state statute directly regulates or discriminates
11 against interstate commerce, or when its effect is to favor in-state economic
12 interests over out-of-state interests, [courts] have generally struck down the statute
13 without further inquiry." *Brown-Forman Distillers Corp. v. N.Y. State Liquor*
14 *Authority*, 476 U.S. 573, 579 (1986). "When, however, a statute has only indirect
15 effects on interstate commerce and regulates evenhandedly, [courts] have
16 examined whether the State's interest is legitimate and whether the burden on
17 interstate commerce clearly exceeds the local benefits." *Id.* Defendants argue
18 California's "Made in USA" statute indirectly effects interstate commerce so
19 Plaintiffs will limit their argument to the second prong. Mot. at 15-19.

20 "Under the 'balancing' approach, a court must identify the state's interests in
21 its legislation, ensure that they are legitimate, and then determine whether the state
22 law imposes an excessive burden on interstate commerce in relation to those
23 legitimate interests." *Valley Bank of Nevada v. Plus System, Inc.*, 914 F.2d 1186,
24 1194 (9th Cir. 1990). "For a facially neutral statute to violate the commerce
25 clause, the burdens of the statute must so outweigh the putative benefits as to make
26 the statute unreasonable or irrational." *Alaska Airlines, Inc. v. Long Beach* 951
27 F.2d 977, 983 (9th Cir. 1992).
28

1 According to Defendants, the California statute is an impermissible violation
 2 of the Dormant Commerce Clause, not because it is impossible for manufacturers
 3 such as Defendants to comply with California law, but rather because it is unduly
 4 burdensome because manufacturers would have to either “(i) refrain from selling
 5 their products in California, (ii) label all their products for sale to California, thus
 6 losing the benefits of the “Made in the U.S.A.” label, or (iii) keep a separate supply
 7 of product on hand for sales to California.” Mot. at 19. Defendants fail to
 8 acknowledge the fourth option, and most important option, which is to provide
 9 truthful labeling to consumers. Defendants also make the far-fetched claim that
 10 requiring a truthful label under state law would be contrary to public policy,
 11 “harmful to the public,” and would deter companies from manufacturing in the
 12 United States. Mot. at 17-18.⁸ This is simply not so.

14 As Defendants recognize in their brief, “the fact that a product is Made in
 15 the USA. [sic] becomes increasingly valuable to consumers who wish to buy
 16 American.” Def. Mot. at 9 [citing 62 FR 25020-01 at 25023]. Defendants further
 17 recognize that consumers feel a “Made in USA” label means supporting jobs or
 18 employment in the United States, keeping dollars in the United States, or other
 19 benefits relating to the United States economy. Def. Mot. at 10. Thus, full
 20 disclosure relating to where a product is made or where its component parts come
 21 provides a meaningful benefit to consumers.⁹ Furthermore, contrary to

22 ⁸ To the extent Defendants rely on or cite to studies or surveys sponsored by
 23 the FTC, such studies are unsubstantiated, not relied upon in the FAC, and create
 24 issues of fact not inappropriately considered on a motion to dismiss. *Arpin v.*
 25 *Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001) [excluding
 “evidence outside the complaint [because] . . . such extraneous evidence should not
 be considered in ruling on a motion to dismiss.”]

26 ⁹ **“Simply Stated: labels matter.** The marketing industry is based on the
 27 premise that labels matter, that consumers will choose one product over another
 28 similar product based on its label and various tangible and intangible qualities they
 may come to associate with a particular source. . . . In particular, **to some**
consumers, the “Made in U.S.A.” label matters.” *Kwikset Corp.*, 51 Cal.4th at 328.

1 Defendants' argument, the California statute would not deter businesses from
2 manufacturing within the United States or have a negative impact on the economy.
3 Rather, a truthful labeling requirement would encourage companies to manufacture
4 entirely within the United States because they would be able to use the unqualified
5 "Made in U.S.A" label. Moreover, even if a manufacturer had to add a qualifying
6 statement that its component parts were made elsewhere, it would still be entitled
7 to use the "Made in U.S.A." language. Thus, a manufacturer still can label its
8 products as made in the USA and receive the economic benefits of doing so.

9 When assessing the burden analysis, the case of *Ferguson v. Friendfinders,*
10 *Inc.*, 94 Cal.App.4th 1255 (2002), is persuasive. In *Ferguson*, the court considered
11 whether a consumer protection statute prohibiting deceptive, unsolicited emails
12 violated the Dormant Commerce Clause. It found California had "a substantial
13 legitimate interest in protecting its citizens from the harmful effects of deceptive
14 [unsolicited commercial emails]" and "furthers that important interest." *Id.* at
15 1268. The court also held the statute "requires truthfulness in labeling" and "the
16 burdens imposed on interstate commerce ... are minimal." *Id.* at 1269. In fact, the
17 court noted the statute "actually 'facilitates [interstate commerce] by eliminating
18 fraud and deception.'" *Id.* at 1269 (citing *State v. Heckel*, 24 P.3d 404, 411(2001)).

19 Similarly, California's "Made in USA" statute affects an out-of-state entity
20 only if that entity has affirmatively chosen to send its products for sale into
21 California. *S.D. Myers, Inc. v. City & County of San Francisco*, 253 F.3d 461, 469
22 (9th Cir. 2001). As stated *supra*, California has a legitimate police power in
23 protecting the public from false advertising. *Keimer*, at 1230. "Obviously,
24 legislation designed specifically to protect consumers from deceptive or misleading
25 advertising directly advances the state's interest in preventing such abuses." *Id.* at
26 1231. The only burden on Defendants would be a simple change to a qualified
27
28

1 country of origin designation such as "Assembled in USA," "Built in the USA,
2 "Made in USA with domestic and foreign made component parts," or numerous
3 other more accurate alternatives.

4 Undeterred, Defendants cite two cases in support of their position: *Bibb v.*
5 *Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) and *Southern Pacific Co. v. State*
6 *of Arizona ex rel. Sullivan*, 325 U.S. 761 (1945). A cursory review of these cases
7 show that they are not helpful to Defendants, beyond the general legal principals.

8 The Supreme Court in *Bibb* held an Illinois statute requiring a certain type of
9 mudguard violated the Dormant Commerce Clause. *Id.* at 521-522. The decision
10 was founded on an Illinois requirement that was the opposite of other states
11 statutes outlawing these mudguards and which made compliance with other state
12 statutes and the Illinois statute impossible. *Id.* at 523. As a result, trucks traveling
13 through Illinois had to stop and change the mudguards on their vehicle in order to
14 pass through the state, which was a costly and timely exercise, and then had to
15 change the mudguards back once they left the state in order to comply with the rest
16 of the country's laws. *Id.* at 527. The Court found that the mudguard required by
17 Illinois had no advantage over the mudguards used in other states and actually
18 posed a greater safety hazard. *Id.* at 525. The Court said: "A State which insists on
19 a design out of line with the requirements of almost all the other States may
20 sometimes place a great burden of delay and inconvenience on those interstate
21 motor carriers entering or crossing its territory." *Id.* at 529-530. Thus, compliance
22 with the Illinois statute would automatically make the truck illegal once it crossed
23 into the vast majority of other states and had a severe impact on interstate
24 commerce. Unlike *Bibb*, compliance with the California statute does *not* interfere
25 with or violate the laws of *any other state*. In fact, compliance with the California
26 law further promotes the purpose of the laws of all other 49 states (to prevent
27
28

1 deceptive advertising).

2 The challenged statute in *Southern Pacific Co.* concerned the number of
3 railroad cars operating in Arizona and conflicted with the Commerce Clause. 325
4 U.S. 761 at 763. While others states did not limit the length of railroad trains,
5 Arizona did, making it illegal for certain sized trains to enter the state. *Id.* at 763.
6 "The serious impediment to the free flow of commerce by the local regulation of
7 train lengths and the practical necessity that such regulation, if any, must be
8 prescribed by a single body having a nation-wide authority are apparent." *Id.* at
9 775. The Arizona statute "does go too far" because "[i]ts attempted regulation of
10 the operation of interstate trains cannot establish nation-wide control such as is
11 essential to the maintenance of an efficient transportation system, which Congress
12 alone can prescribe." *Id.* at 781-782. The Court held that the law "materially
13 impedes the movement of appellant's interstate trains through that state and
14 interposes a substantial obstruction to the national policy proclaimed by Congress,
15 to promote adequate, economical and efficient railway transportation service." *Id.*
16 at 773. Here, the California statute does not impede interstate travel, is not
17 contrary to Congress' objectives, and is not contrary to other state laws.

18
19 As evidenced above, Defendants take these case out of context. Both *Bibb*
20 and *Southern Pacific Co.* involve the regulation of interstate vehicles whose travel
21 is impeded by a single state's statute that is impossible to comply with while also
22 complying with other state laws. No such extraordinary circumstance exists here.
23 Defendants present no extrinsic evidence (nor can they in this particular type of
24 motion) showing the policy of California is misplaced. Defendants proffer no
25 other state statutes showing the complete conflict in laws with California or any
26 substantial impediment to interstate commerce.

27
28 Finally, Defendants suggest California's "Made in USA" results in a

1 nationwide application of California law because nationwide corporations selling
2 products must comply with California's law. *See* Def. Mot. at 16-19. An identical
3 argument was raised and rejected in *S.D. Myers* when considering a city ordinance.

4 In response, the court stated:

5
6 Even were we to assume that the Ordinance's requirements
7 constitute an economic penalty, narrowly construed the
8 Ordinance only applies in the City, on City-owned property, or
9 as to employees working on a City contract. Thus, the Ordinance
10 is "supported by the [City]'s interest in protecting its own
11 consumers and its own economy." *Id.*, at 572. While it is possible
12 that the City could attempt to wield extraterritorial control
13 through broadly interpreting section 12B. 1(d)(iii), on this facial
challenge we will not invalidate the Ordinance unless Myers can
"establish that no set of circumstances exists under which the
[Ordinance] would be valid." *See Salerno*, 481 U.S. at 745.

14 *Id.* at 472. As previously concluded, "[a]lthough the laws set out different
15 standards for the use of 'Made in the U.S.A.' labels, it would not be impossible for
16 Defendants to comply with both laws.

17 California's "Made in USA" only applies to products being sold within the
18 borders of California to its citizens. California is furthering its police powers and
19 its policy of consumer protection. Plainly, the statute does not violate the Dormant
20 Commerce Clause, and the Motion can be denied on this basis.

21 **VII. CONCLUSION.**

22 Based on the foregoing reasons, Defendants have failed to show that
23 Plaintiffs' claims are preempted by either the FTC Act or the TFPIA or that the
24 California "Made in U.S.A." statute violates the Dormant Commerce Clause.
25 Plaintiffs respectfully request that the Court deny Defendants' motion to dismiss

26 ///

27 ///

1 and require Defendants to file an answer within a reasonable time period.

2 Dated: January 2, 2015

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